

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

and proof of service

77-1456

To be argued by
JESSE BERMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

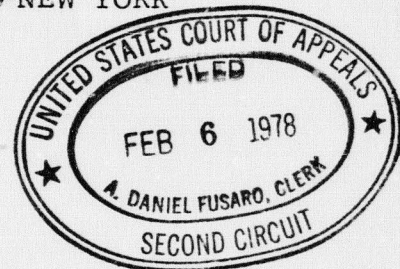
JOSE MIGUEL ATILES,

Appellant.
-----X

B
P/S
Docket No. 77-1456

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION
RENDERED IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
JOSE MIGUEL ATILES, :
Appellant. :
-----X

ISSUES PRESENTED

1. Whether appellant's single act of encouraging the April 12 attempted sale by Perez was insufficient to bring him within the ambit of the multi-sale conspiracy charged in the indictment.

2. Whether the prosecutor's failure, under Brady v. Maryland, to disclose at the time of trial that Perez would testify only that appellant was present on April 12, unfairly misled appellant into not calling Perez as a witness and deprived appellant of Perez' exculpatory version of appellant's role on April 12.

3. Whether the Court's two Allen-type charges, with their one-sided reference to expense for and inconvenience to Government witnesses and prosecutors, improperly tended to coerce the jury into a verdict.

4. Whether the Court abused its discretion by arbitrarily permitting the jury to see the actual heroin, despite appellant's stipulations that it was heroin and had been in his plain view, and his stipulation to the chain of custody.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (Conner, J.), rendered November 9, 1977, convicting appellant, after trial by jury, of one count of conspiracy to distribute heroin [21 U.S.C. §846] and one count of possession of heroin with intent to distribute [21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A)], and sentencing him, under 18 U.S.C. §3651, to concurrent terms of eighteen months on each count, the first six months of which were to be served in jail, and the remaining year to be served on probation, followed by a three year special parole period.

Timely notice of appeal was filed and this Court, on November 15, 1977, appointed Jesse Berman, Esq., as counsel on appeal, pursuant to the Criminal Justice Act.

Appellant is presently incarcerated pursuant to the judgment.

B. Statement of Facts

1. The Indictment

Appellant was charged, together with Manuel Perez, in a five-count indictment:

Count One accused appellant and Perez of conspiracy

from January 1, 1977 to May 2, 1977, to sell heroin.

Count Two (in which appellant was not named, and with which appellant had no connection whatever) accused Perez of selling one ounce of heroin on January 28, 1977.

Count Three (in which appellant was not named, and with which appellant had no connection whatever) accused Perez of selling one ounce of heroin on February 14, 1977.

Count Four (in which appellant was not named, and with which appellant had no connection whatever) accused Perez of selling four ounces of heroin on February 23, 1977.

Count Five accused both Perez and appellant of possessing five ounces of heroin, with intent to distribute, on April 12, 1977.*

2. Perez' Guilty Plea

On September 12, 1977, Perez pleaded guilty to counts 2 and 5 of the instant indictment and the government agreed to the dismissal of counts 1, 3 and 4 as to Perez (P. 2).**

* The entire indictment is reproduced in Appellant's Appendix, at A-1 through A-5.

Appellant moved, on June 2, 1976, for a severance of the trial of counts 1 and 5 from the trial of counts 2, 3 and 4, claiming that prejudicial spillover would result from proof of the three sales which did not involve appellant.

** "P." refers to the minutes of the guilty plea of Manuel Perez, September 12, 1977.

Significantly, the government agreed to the dismissal of the conspiracy count (and of substantive counts 3 and 4) against Perez, and it had previously acknowledged that there were no other alleged conspirators in this case, indicted or unindicted, other than Perez and appellant (See minutes of pre-trial conference of 9/1/77, at p. 3).

At the request of the government, the allocution of Perez' plea was conducted under oath (P. 3). Perez' only mention of appellant occurred in connection with count 5:

BY THE COURT:

"Q. Now let us turn to Count 5. It charges that on or about the 12th day of April, 1977, in the Southern District of New York, you and Jose Miguel Atilas possessed with intent to distribute and distributed approximately five ounces of heroin hydrochloride.

"A. Yes.

"Q. Did you participate in a deal of that kind?

"A. Yes.

"Q. Can you tell me what you did in that connection?

"A. I got home and I was upstairs with Mike and - -

"Q. You were upstairs with Mike?

"A. Right.

"Q. Is that Jose Miguel Atilas?

"A. Yeah.

"Q. You call him Mike?

"A. Yeah.

"Q. You were at home and he was there?

"A. Right.

"Q. All right.

"A. And the two agents came up, they wanted to know what I had on the table, they wanted to

know how much was it. I gave them a price.

"Then one agent said to the other, 'Go downstairs and get the money.'

"When the agent came up I was arrested and Miguel Atilas was arrested.

"Q. And how much heroin did you have there?

"A. Five ounces.

"Q. Whose was it? Was it yours or someone else's?

"A. No, someone else's.

"Q. Was it Mr. Atilas?

"A. No.

"Q. Still another party?

"A. Yes.

"Q. And what were you supposed to get out of the transaction?

"A. Five hundred, something like that.

"Q. What was the total price of the five ounces that you gave to the agents?

"A. Six thousand.

* * *

"Q. And in connection with the transaction referred to in Count 5 involving five ounces on the 12th of April, it was your purpose to sell that heroin to the two agents?

"A. Right.

"Q. And the only thing that prevented that sale was that you got arrested before you made delivery and received payment?

"A. Yes.

"Q. And that was at your apartment in Manhattan on or about the 12th day of April 1977?

"A. Yes.

* * *

"Q. What was Mr. Atilas role in this transaction?

"A. Partner.

"Q. He was a partner?

"A. Yeah.

"Q. He was going to share in the \$500?

"A. Yeah.

"Q. For what ratio? Who was going to get what share?

"A. 250, 250.

"Q. 250 each. And this was all understood between you and him?

"A. Yes.

* * *

"Q. You say you delivered or you were intending to deliver the five ounces in your apartment?

"A. Right.

"Q. Did you go somewhere else to pick it up?

"A. Yes.

"Q. Or did Mr. Atilas?

"A. No, he had nothing to do with it at the moment. I was the one who went running around."

(P. 13-17)

The government then indicated that Perez' above statement was:

" . . . a significantly different statement just now under oath than he did prior, and the government wishes to give him an opportunity to retract and amend that statement."

(P. 17)

The prosecutor then led Perez through the following questions:

"Q. Mr. Perez, you spoke with me this morning in my office, did you not?

"A. Yes.

* * *

"Q. You and Mr. Atilas together, on the 12th of April, went to the Two Step Bar for the purpose of picking up five ounces of heroin, is that correct?

"A. Yes.

"Q. And so it was not just you yourself alone who was doing the running around, Mr. Atilas was - -

"A. No, I was doing the running around. He just came with me. I was doing the running around.

"Q. But he knew you were going to pick up five ounces of heroin?

"A. After I got there, yeah. You know, we talked.

"Q. And there was an agreement between you that the two of you were going to pick up five ounces of heroin to bring back to your apartment?

"A. He didn't know that much. I didn't tell him.

* * *

"Q. And he was present when you sold or offered to sell that amount of heroin to the two agents who were in your apartment?

"A. Yes, that's true.

"Q. And he agreed with you that it should be sold to those two people?

"A. Yes."

(P. 18-19)

Perez' above plea allocution was, of course, never cross-examined.

3. The Trial

Prior to opening statements, appellant indicated that he would object to the evidence of the three sales made exclusively by Perez (January 28, 1977; February 14, 1977; February 23, 1977), on the ground of lack of connection to appellant, and that he would seek a mistrial if those three were never properly connected to a conspiracy involving appellant (T. 8-10).*

Appellant offered to stipulate "that all of the exhibits which were supposed to be heroin are heroin" (T. 10) and to stipulate to the chain of custody of all the heroin exhibits, and agreed that the actual physical heroin not be brought into the courtroom and displayed to the jury, arguing that once the above stipulations were entered, the

* "T." refers to minutes of trial, September 29, October 3, 4, 5 and 6, 1977.

actual physical heroin ceases to have any additional probative value and has only a prejudicial effect. The Court at first agreed:

"The Court: . . . I really can't see the need for having the heroin physically present in the courtroom and displayed. It does involve some hazard."

(T. 12)

Later, after the luncheon recess, the Court again seemed to agree:

"The Court: It's probative impact is totally unnecessary in view of the stipulation. Even a trivial prejudicial possibility might be sufficient to exclude it if it is totally unnecessary."

(T. 55)

The Court, however, wanted to know if appellant was going to testify, and appellant's position was that he could not answer that question until after the government rested (T. 62). Appellant's counsel noted that Officer Nieves was going to testify for the government that appellant had said that the heroin was excellent. Thus, appellant "obviously knew that there was heroin there There is never any dispute that the heroin was in plain view" (T. 63). The Court's response was, "I'm afraid 10,000 words of description would not be equivalent to one look at the heroin from the jury" (T. 66), and it permitted the actual physical heroin to be shown to the jury.

Detective Ralph Nieves, of the New York City Police Department, testified that on April 12, 1977, while acting in an undercover capacity, he met appellant in Manny Perez' apartment (T. 73). That night, Nieves and Police Officer Julio Mercado had knocked on the door of Perez' apartment and were admitted by Perez (T. 79). Perez introduced appellant as his partner (T. 83). Appellant was then seated at a table in the dining area opposite the kitchen.

Perez referred to Nieves as one of his better customers and Nieves asked Perez whether he had the ten ounces. Perez said "they" were only able to get five and Nieves agreed to take the five (T. 84).

Perez went into the kitchen and brought out the five ounces (Gov. Exh. 1), which he placed on the table (T. 85) and which Perez then gave to Nieves (T. 87). According to Nieves, appellant "commented that the quality of the heroin was excellent" (T. 91), and when Perez said "they" would go to Brooklyn to get more, appellant "nodded affirmatively" (T. 92). Perez and Nieves then negotiated and agreed on a price of \$1400 an ounce (id.). After a pre-arranged signal, the two officers arrested Perez and appellant. Various narcotics paraphernalia were also seized from Perez' apartment by the officers (T. 94-97).

Detective Nieves then testified to his other pur-

chases of heroin from Perez - January 28, 1977, February 14, 1977 and February 23, 1977 (T. 100-158). Appellant objected to all the evidence of Perez' other transactions, arguing that the evidence against appellant was limited to his involvement, if any, in the single transaction of April 12, 1977, and that such a single transaction did not make him accountable for all of Perez' prior sins, nor did that one transaction make him a knowing member of a pre-existing conspiracy (See, e.g., T. 102, 103).

The Court was clearly troubled by this single transaction issue:

"The Court: There is nothing connecting him to the earlier sales other than the fact that he was introduced on [April] 12th as a partner?

"[The prosecutor]: That is correct, your Honor.

"The Court: I think it is very questionable whether that makes admissible the evidence of the prior sales.* He may have been a partner on the 12th and not a partner at any prior time."

(T. 104-105)

* * *

"The Court: . . . if [appellant] jointed only one member of the organization after the other conspiracy had ended, then he wouldn't be responsible.

* The Court ultimately admitted against appellant the evidence of all of Perez' prior sales on the substantive count as well, rather than limiting it to the conspiracy count.

"I wonder whether or not you are taking a chance to try to introduce evidence of those earlier sales. Whether or not it is not a completely unnecessary chance. It seems to me that it adds very little to your case.

"Do you really want to take that chance?"

(T. 108)

* * *

"The Court: I think there is ample reason to be cautious about it, and I would wish that the government would feel otherwise.

"But if you insist, I feel I have to let it go in."

(T. 112-113)

On cross-examination, Nieves acknowledged that on February 11, 1977, during Nieves' negotiations with Perez, Perez had said that he had only one partner, that on March 22, 1977, Perez introduced one Andino Rivera as his partner, that Rivera had himself specifically stated that he was Perez' partner, and that both Perez and Rivera had shared in the specific discussion of fifteen ounces of heroin (T. 187).

As of April 11, 1977, appellant had in no way stepped into the picture (T. 189), and on April 12 he was a complete stranger to Nieves (T. 195). Prior to April 12, Nieves had negotiated with Perez on eight separate occasions and had made three purchases, but neither Perez nor anyone with Perez was arrested on any of those occasions. On April 12, Nieves came equipped with a search warrant and therefore planned, for the first time, to make arrests (T. 193).

When Perez had introduced Rivera as his partner, Nieves had put that fact in his report for that day (T. 196), and when Perez said he had only one partner, Nieves had also put that fact in his report (T. 198), but there was no mention in Nieves' report on April 12 of Perez' allegedly introducing appellant as his partner (T. 199).

Nieves also admitted that the plural pronouns which Perez had allegedly used to refer to himself and appellant (T. 84, 92) were indeed in the singular in Nieves' report and referred only to Perez (T. 201). Nor was there anything in Nieves' report about appellant "nodding affirmatively" (T. 202).

No drugs or weapons were found on appellant's person on April 12 after his arrest, nor did appellant have any of the hundreds of pre-recorded bills which had been paid to Perez by Nieves for the three earlier sales (T. 205-208).

Agent Paul Buceti, of the Drug Enforcement Administration, and Detective Vincent Palazzotto, of the New York City Police Department, testified that they had seized some additional heroin, which had not been in plain view, from Perez' apartment. This, too, was admitted, over objection, against appellant.

Officer Julio Mercado, of the New York City Police Department, testified that, in an undercover capacity, he went to Perez' apartment with Nieves on April 12 (T. 266). Mercado's version of the April 12 incident was virtually identical to the one given by Nieves, although Mercado de-

nied ever having discussed with Nieves the facts of the April 12 transaction (T. 277).

After the government rested, appellant moved, under Rule 29, for a judgment of acquittal. As to the conspiracy count, he renewed his single-transaction argument (T. 286, 298). When this motion was denied (T. 289), appellant moved for a mistrial, based on the improper admission of the evidence of Perez' three earlier sales. This was also denied (T. 291).

The Court again expressed its concern about the single-transaction problem:

"The Court: But when [Perez] takes as a partner in April a man with whom, so far as the record shows he has never had any contact before, does that man become liable for everything that [Perez] has done as long as he has been in the business?"

(T. 336)

"The Court: But is there any way that he can know that there must have been three earlier transactions or more?"

(T. 337)

"The Court: I don't see how you can infer that he knew that he was getting into a partnership with a man who had been dealing for three months."

(T. 337-8)

4. The Court's Charge*

In its charge on conspiracy, the Court told the

* The entire text of the Court's charge to the jury is reproduced in Appellant's Appendix, at A. 10 through A. 65.

jury:

"From the actual distribution or possession with intent to distribute narcotic drugs, specifically heroin, it is possible for you to conclude that a conspiracy existed, that is, the performance of an act, as I will tell you further, may be taken by you as evidence of a conspiracy to perform the act."

(A. 18)

The Court's charge allowed the jury to satisfy the overt act requirement by merely finding any one of Perez' January or February sales (A. 30, A. 31).

5. The Jury Deliberations

Deliberations commenced on October 4, 1977, at 3:45 P.M. (T. 477).

At 5:07 P.M., the jury sent a note (Court's Exhibit 1) requesting "the three criterias [sic] for the count of conspiracy" (T. 479). The Court and the government proposed that the Court merely list the three elements, while appellant asked that the Court give the full definition of the three elements (T. 484). The Court merely listed three elements, in a total of nine lines of text (T. 485-6), and appellant took exception (T. 486).

The jury deliberated until 5:55 that evening (T. 493).

On the following day, October 5, deliberations continued at 9:30 A.M. (T. 497). A note (Court's Exhibit 2) was received from the jury at 10:50 A.M.* (id):

* The envelope containing the note (Court's Exhibit 2) indicates it was received at "10:40 A.M."

"Please further explain elements '1' and '2' of count one.

"With respect to the second element please draw the distinction of knowingly and willingly associating or taking part in a conspiracy; and knowing of the conspiracy."

The note also asked for the testimony of Nieves and Mercado regarding introduction of appellant and the comments made by appellant.

Appellant argued, unsuccessfully, that the note called for more than a mere repetition of a portion of the Court's original charge, and that the Court should draw the specific distinction requested in the note (T. 512), and appellant again excepted (T. 531-2).

After the testimony was read back, the jury continued deliberating.

At 5:50 P.M.,* another note (Court's Exhibit 3) was received from the jury (T. 537):

"After numerous discussions and reviews of the charges and evidence presented, we the jury are in a deadlock. We have voted several times and have not been able to reach unanimity. At this point it appears that further discussions would be futile."

The Court announced its intention to give an Allen charge and to then send the jury home, without any deliberations until the following morning. Appellant

* The envelope containing the note (Court's Exhibit 3) bears the notation "5:53 P.M."

objected to this proposed timing of the Allen charge, arguing that if the jurors were given an Allen charge and were then sent home without any intervening deliberations, "they are going to think about the Allen charge over the night and not about the case" (T. 538). Appellant also argued that the note indicated that the jury was so inexorably deadlocked that an Allen charge was inappropriate and might force a verdict that was not the conscientious verdict of each juror (T. 540).

After that objection was overruled, appellant suggested that the Allen charge be coupled with a charge on reasonable doubt. This, too, was denied (T. 541).

The Court then indicated that it was "inclined to add" that:

" . . . the trial involves expense for the government, inconvenience for the witnesses, and that it also involves suspense and mental anguish for the defendant."

(T. 544)

Appellant objected to the proposed reference to expense to the government as one-sided and unnecessary, and he objected to the proposed reference to inconvenience of witnesses as inappropriate in this case, where all the witnesses were government agents called by one side, i.e., the government (T. 544-5).

When the jury came in, the Court made it more one-sided by including, in addition to allusions to

"considerable expense for the government" and inconvenience to witnesses, a remark that the government attorney was "tied up and prevented from doing other work" (A. 67). The jury was then sent home for the night (T. 548).

On the following morning, October 6, the jury resumed deliberations at 11:15 A.M. (T. 549). At 2:30 P.M., a note (Court's Exhibit 4) was received from the jury:

"Your Honor, we the jury have again continued our review of the evidence brought forth along with the testimonies [sic]; and there is still a deadlock among us. We the jury cannot reach a unanimous decision.

"Please advise us further. Thank you."

Appellant argued that apparently the Allen charge had not been what the jury needed, and that what the jury needed was a charge on reasonable doubt (T. 550). When the Court refused to do this, appellant asked what the Court planned to do, and, specifically, whether the Court intended to give anything in the nature of an Allen charge. The Court said it might summarize the Allen charge, and appellant was given a continuing objection to all further Allen charges (T. 552).

Again the Court gave the one-sided reference to expense and inconvenience for the government and its attorneys:

"As I told you, the government must go to considerable expense and considerable involvement of its attorneys and the

drug enforcement agents in order to put on a trial."

(A. 71)

Again appellant specifically took an exception (A. 72).

At 3:00 P.M., the jury left the courtroom to resume deliberations (T. 554), and at 4:20 P.M.* it sent a note announcing it had reached a verdict. Appellant was found guilty on both counts (T. 556), and appellant was permitted to reserve post-trial motions until the time of sentence (T. 564).

6. The Sentence Proceedings

Appellant moved to set aside the verdict on the ground that the pre-sentence report revealed that, at the time of appellant's trial, Perez had told the prosecutor that, if called, he would testify only that appellant was present at the April 12 incident (S. 3-4).**

Appellant argued that he had not called Perez because of Perez' statement, on September 12, 1977, that appellant was supposed to get \$250 out of the deal (p. 16), that the prosecutor had had a Brady duty to share with appellant the information that at time of trial Perez would only testify that appellant had been present, and that if

* According to the envelope containing Court's Exhibit 5.

** "S." refers to minutes of sentence, November 9, 1977.

the prosecutor had properly made that Brady disclosure, appellant would have called Perez as a witness (S. 3-4). The motion was denied (S. 5), as was appellant's motion for a hearing to establish exactly what Perez had told the prosecutor at the time of appellant's trial (id.).

Appellant also renewed his Rule 29 motion and also moved for a new trial based on the supplemental charges which appellant had previously objected to (S. 6-7).

The Court sentenced appellant, under 18 U.S.C. § 3651, to concurrent terms of eighteen months on each count, the first six months of which were to be served in jail, and the remaining year to be served on probation, followed by a three-year special parole period.

Appellant will complete the jail portion of this sentence before this appeal is argued.

ARGUMENT

POINT I.

APPELLANT'S SINGLE ACT OF ENCOURAGING
THE APRIL 12 ATTEMPTED SALE BY PEREZ
WAS INSUFFICIENT TO BRING HIM WITHIN
THE AMBIT OF THE MULTI-SALE CONSPIRACY
CHARGED IN THE INDICTMENT.

The law in this Circuit is well settled as to when a single act makes a defendant a knowing member of a specific conspiracy:

"For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws,

must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which such knowledge may be inferred."

United States v. Sperling,
506 F. 2d 1323, 1342 (2d Cir. 1974)

See, also, United States v. Torres, 503 F. 2d 1120 (2d Cir. 1974); United States v. DeNoia, 451 F. 2d 979, 981 (2d Cir. 1971); United States v. Agueci, 310 F. 2d 817, 836 (2d Cir. 1962); United States v. Aviles, 274 F. 2d 179, 189 (2d Cir. 1960).

In the instant case, it was virtually beyond dispute that the evidence linked appellant to only the April 12 transaction:

"The Court: There is nothing connecting him to the earlier sales other than the fact that he was introduced on [April] 12th as a partner?

"[The prosecutor]: That is correct, your Honor.

"The Court: I think it is very questionable whether that makes admissible the evidence of the prior sales. He may have been a partner on the 12th and not a partner at any prior time."

(T. 104-105)

* * *

"The Court: . . . if [appellant] joined only one member of the organization after the other conspiracy had ended, then he wouldn't be responsible.

"I wonder whether or not you are taking a chance to try to introduce evidence of

those earlier sales. Whether or not it is not a completely unnecessary chance. It seems to me that it adds very little to your case.

"Do you really want to take that chance?"

(T. 108)

* * *

"The Court: I think there is ample reason to be cautious about it, and I would wish that the government would feel otherwise.

"But if you insist, I feel I have to let it go in."

(T. 112-113)

The evidence of Perez' earlier sales may well have been admissible to prove the extent of an earlier conspiracy between Perez and Perez' earlier associates (such as Rivera), but nothing in the events of April 12 either independently proved or tended to imply that appellant had any connection with or knowledge of Perez' earlier dealings. Sperling, supra.

To the contrary, on February 11, 1977, during Nieves' negotiations with Perez, Perez had said that he had only one partner. On March 22, 1977, Perez introduced Andino Rivera as his partner, and Rivera himself specifically stated that he was Perez' partner, and both Perez and Rivera shared in specific discussion of fifteen ounces of heroin (T. 187).

As of April 11, 1977, appellant had in no way stepped into the picture (T. 189), and on April 12 he was

a complete stranger to Nieves (T. 195).

When appellant was arrested on April 12, he did not have in his possession any of the hundreds of pre-recorded bills which had been paid to Perez by Nieves for the three earlier sales (T. 205-208).

Appellant repeatedly renewed his single act/single transaction motion (T. 286, 298), and at the close of the trial, the Court seemed persuaded:

"The Court: But when [Perez] takes as a partner in April a man with whom, so far as the record shows he has never had any contact before, does that man become liable for everything that [Perez] has done as long as he has been in the business?"

(T. 336)

"The Court: But is there any way that he can know that there must have been three earlier transactions or more?"

(T. 337)

"The Court: I don't see how you can infer that he knew that he was getting into a partnership with a man who had been dealing for three months."

(T. 337-8)

The Court, however, let the conspiracy count go to the jury when, as a matter of law, it should have granted the Rule 29 motion as to that count. The several notes from the jury about re-defining conspiracy, and specifically membership in a conspiracy, as well as the deadlock among the jurors, serve to underscore the error of the Court's ruling in letting the conspiracy charge go to the jury.

The law, as set forth above, is clear, and the judgment on the conspiracy count must be reversed and that charge must be dismissed.

Since appellant received concurrent sentences on the two counts, and

" . . . since the fact of conviction on both counts might have affected the sentences imposed for each"

United States v. Sperling, supra,
506 F. 2d at 1343

the matter should be remanded for resentencing on the substantive count.

POINT II.

THE PROSECUTOR'S FAILURE, UNDER BRADY v. MARYLAND, TO DISCLOSE AT THE TIME OF TRIAL THAT PEREZ WOULD TESTIFY ONLY THAT APPELLANT WAS PRESENT ON APRIL 12 UNFAIRLY MISLED APPELLANT INTO NOT CALLING PEREZ AS A WITNESS AND DEPRIVED APPELLANT OF PEREZ' EXCULPATORY VERSION OF APPELLANT'S ROLE ON APRIL 12.

This Court is well familiar with the long line of cases flowing from Brady v. Maryland, 373 U.S. 83 (1963), and requiring that prosecutors promptly disclose exculpatory material. See, e.g., Giglio v. United States, 405 U.S. 150 (1972); United States v. Sperling, 506 F. 2d 1323, 1333 (2d Cir. 1974); United States v. Seijo, 537 F. 2d 694 (2d Cir. 1975).

Most Brady-type claims reviewed by this Court have involved materials found after trial, which could have been used to impeach prosecution witnesses.

In the instant case, the situation is rather one

in which the defense decided not to call a witness because (1) the defense did not know that the witness' testimony would be exculpatory to appellant, (2) the prosecutor knew, but did not disclose, and (3) the defense, aware of the allocution at the witness' earlier guilty plea had no reason to guess that, at the time of trial, the witness was prepared to give an exculpatory version of appellant's role on April 12.

The prosecutor clearly had a Brady duty to tell appellant, at the time of trial, that Perez would, if called, testify only that appellant had been present on April 12. This would have been exculpatory to appellant and would have rebutted the testimony of the agents, which, of course, had been the only testimony against appellant.

Perez' trial-time statement to the prosecutor was clearly:

" . . . not like FBI reports lying around in files which a prosecutor could well forget."

United States v. Sperling, supra,
506 F. 2d at 1333

This is not a case of one assistant prosecutor accidentally failing to communicate with another assistant prosecutor.

This is not a case where the undisclosed matter was merely 'impeachment material' or merely collateral or merely cumulative.

It went right to the heart of whether appellant had a 'mere presence' defense.

When appellant's counsel, in reading the pre-sentence report, learned what Perez' position had been at the time of trial, he properly moved to set aside the verdict and the Court erred in denying that motion. Certainly the least which the Court should have done was to grant appellant's motion for a hearing to establish exactly what Perez had told the prosecutor at the time of appellant's trial.

The judgment must therefore be reversed and a new trial ordered.

POINT III.

THE COURT'S TWO ALLEN-TYPE CHARGES, WITH THEIR ONE-SIDED REFERENCE TO EXPENSE FOR AND INCONVENIENCE TO GOVERNMENT WITNESSES AND PROSECUTORS, IMPROPERLY TENDED TO COERCE THE JURY INTO A VERDICT.

The recently-stated rule in this Circuit is that:

"The propriety of an Allen-type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientious doubts."

United States v. Robinson,
560 F. 2d 507, 517 (2d Cir.
en banc 1977).

This Court, in Robinson, supra, also noted that "the chances of coercion may increase with each successive appeal by the judge to the jurors to reach a verdict . . ." (id.).*

* In Robinson, supra, the verdict came more than four hours after the second Allen-type charge, and there was nothing objectionable in the text of the Allen-type charges in Robinson.

In appellant's case, the verdict came an hour and twenty minutes after the second Allen-type charge, and the one-sided text of those charges was objectionable and coercive.

In the instant case, the Court gave a second Allen-type charge after a series of notes had established that the jury was resolutely deadlocked. But what was particularly objectionable and coercive about the two Allen-type charges in the instant case was the Court's inclusion, over objection, allusions to "considerable expense for the government", inconvenience to witnesses (all of whom were government agents called by the government), and remarks that the government attorneys were "tied up and prevented from doing other work" (A. 67, 71).

These allusions were all one-sided, favoring the government, and could only have pushed the jury irrationally toward a verdict against appellant. A jury should decide a case solely upon the evidence, as they say, and not upon sympathy for the government, government witnesses or government attorneys.

See, generally, ABA Standards Relating to the Administration of Criminal Justice, Trial by Jury, §5.12; Jenkins v. United States, 380 U.S. 445 (1965) [jury told it must reach verdict]; United States v. Gypsum Co., 550 F. 2d 115 (3d Cir. 1977) [jury should be told it has option of returning no verdict]; United States v. Scott, 547 F. 2d 334 (6th Cir. 1977) [error to tell jury that retrial would have priority and would interfere with trial of civil cases];

United States v. Seawall, 550 F. 2d 1159 (9th Cir. 1977)
[error to repeat Allen-type charge]; People v. Henry, 56
App. Div. 2d 610, 611 (2d Dept. 1977) [error to tell jury
trial had been expensive and cannot afford a hung jury].

Without having to reach the question of the propriety generally of repeated Allen-type charges, this Court should merely hold that in the instant case the repeated references, in the supplementary charges, to expense and inconvenience to government witnesses and government attorneys improperly tended to coerce a verdict, and a new trial should be ordered.

POINT IV.

THE COURT ABUSED ITS DISCRETION BY
ARBITRARILY PERMITTING THE JURY TO SEE
THE ACTUAL HEROIN, DESPITE APPELLANT'S
STIPULATIONS THAT IT WAS HEROIN AND HAD
BEEN IN HIS PLAIN VIEW, AND HIS STIPULATION
TO THE CHAIN OF CUSTODY.

The Court seemed to agree that, in view of the stipulation, the actual physical heroin had no additional probative value:

"The Court: . . . I really can't see the need for having the heroin physically present in the courtroom and displayed. It does involve some hazard."

(T. 12)

* * *

"The Court: Its probative impact is totally unnecessary in view of the stipulation. Even a trivial prejudicial possibility might be sufficient to exclude it if it is totally unnecessary."

(T. 55)

But the Court's ultimate view was, "I'm afraid 10,000 words of description would not be equivalent to one look at the heroin from the jury" (T. 66), and, during the testimony of the first witness, the Court permitted the actual physical heroin to be shown to the jury.

Although Rule 403 of the Federal Rules of Evidence provides for a balancing of the unfair prejudicial effect of an item of evidence against its probative value, this Circuit, in reviewing a Rule 403 decision, will

" . . . uphold the trial judge's exercise of discretion unless he acts arbitrarily or irrationally."

United States v. Robinson,
560 F. 2d 507, 515 (2d Cir.
en banc 1977).

Where the trial Court has noted, as it did here, that the stipulation had rendered the probative impact "totally unnecessary", it was arbitrary for the Court to admit the actual heroin, and thus an abuse of discretion.

Moreover, this Court, in Robinson, supra, stressed the advisability of delaying admission of the questioned item of evidence until most of the other proof is in, so as to better weigh the questioned evidence. In appellant's case the Court did not delay, and it let the heroin go to the jury during the direct testimony of the first witness.

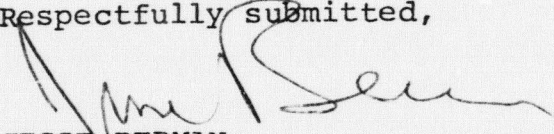
Also in Robinson, supra, this Court approved of the taking of "positive steps to minimize the potential impact of the evidence by precluding the government from introducing

the gun itself . . ." (id. at 515). In the instant case, appellant never contested testimony about the heroin; he merely didn't want the actual heroin to be dangled in front of the jury, and, because the stipulations removed all probative value from the actual heroin, it was arbitrary and an abuse of discretion to let the jury see the heroin, and the judgment should be reversed and a new trial ordered.

CONCLUSION

FOR THE ABOVE REASONS, THE JUDGMENT
SHOULD BE REVERSED, COUNT ONE DISMISSED
AND A NEW TRIAL ORDERED AS TO COUNT TWO
OR APPELLANT SHOULD BE RESENTENCED ON
COUNT TWO.

Respectfully submitted,


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February, 1978

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL SELMAN, being duly sworn, deposes
and says: defendant is not a party to the action, is over
18 years of age and resides at 452 Riverside Dr. My Ny.

On February 6, 1978, served the within
Appellant's Brief
upon Robert B. Fiske, Jr. attorney(s)
for Appellee in this action, at
1 St. Andrew's Plaza, My Ny 10007

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in - ~~post office~~ - official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Mund T. Tuckman

Sworn to before me on
February 6, 1978.

John B. Selman

Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 1978